THE PRESIDENTIAL SUCCESSION ACT OF 1886.

THE Constitution of the United States, article 2, section 1, prescribes:

"The Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed, or a President shall be elected."

The Act of Congress of March 1, 1792, provided that the vacancy in the office of President, when there is no Vice-President, should be filled by the President *pro tempore* of the Senate, or, if none, by the Speaker of the House, until the election of a President by special election prescribed by the Act.

The Act of January 19, 1886, or that part which is material to this inquiry, substitutes for the President *pro tempore* of the Senate and the Speaker of the House, the Secretary of State and after him the other Cabinet officers respectively, as successors to the office of President, and abolishes the special election of President prescribed by the Act of 1792. It further provides:

"That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting."

A Committee of the House of Representatives, in reporting favorably upon the Senate bill which afterwards became the law of 1886, stated that there were certain doubts and difficulties connected with the Act of 1792 which "would disturb the succession under the present statutes, and would in all probability lead to contest over it that would disquiet the nation, unsettle business, and disturb the peace of the country."

An examination of this committee report and of the debates in Congress reveal the difficulties which it was the purpose of the

Act of 1886 to remove. Prominent among them was the question whether the President *pro tempore* of the Senate and the Speaker of the House were such officers of the United States, within the meaning of the Constitution, as could succeed to the Presidency, and, if eligible to the succession, there was added the practical difficulty that at times in our history these offices have both at the same period of time been vacant. Of equal importance was the question whether Congress has constitutional power to provide by law for an intermediate election of President; conceding Congress to have the power, there was added the difficulty that assuming the term of a President elected under an intermediate election to be four years, — and such a term was assumed in the debates, — the inauguration of future Presidents might be changed to a time other than that regularly prescribed in the Constitution, thus destroying the harmony between the co-ordinate branches of the government, and plunging its affairs into confusion.

Undoubtedly it was the intention of Congress, in enacting the law of 1886, to remove every difficulty which could have arisen under the old law. It was also generally supposed that the Act had settled all such difficulties by repealing the special election provisions of the old law and by fixing the term of the acting President for the balance of the regular unexpired term, thus continuing in power the party which had succeeded in the last election. Turning to the text-books, however, we find a lack of agreement as to what the Act has done in fact. For example, Cooley's "Principles of Constitutional Law"[1] states in a foot-note that the acting President will hold office until the next regular inauguration; Professor Hart in "Actual Government" takes the same view,[2] while in Andrews' "Manual of the Constitution"[3] it is stated that the acting President will hold office only until a new President is elected as by the law of 1792, that is, by special election.

It is the purpose of this article to consider how the Act of 1886 has changed the old law; to examine the Constitution and the legislative proceedings, including the Act of 1886, to determine to what extent the shortcomings of the old have been solved by the new law; and finally to consider whether any further legislation or constitutional amendment is needed.

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[1] Cooley, Principles of Constitutional Law 51, n. 4.

[2] Hart, Actual Government 265.

[3] Andrews, Manual of the Constitution of the U. S. 179.

The Intent of the Framers of the Constitution. The language of the Constitution providing that the acting President shall hold office until the disability be removed or "*until a President shall be elected*" is broad enough to include either a regular or a special election; there is nothing, however, to be found in any part of the Constitution expressly providing for a special election.

In the proceedings of the Constitutional Convention, however, we find some light. The draft of the Constitution originally submitted by the Committee of Detail on August 6, 1787, contained no provision for a Vice-President, but designated the President of the Senate as successor to the Presidency in case of vacancy, and it was specifically provided that his term should continue "until another President of the United States be chosen or until the disability of the President be removed." Presumably the tenure of his office was intended to be a limited one as is shown by the arrangement of the sentence, the reference to another election preceding the reference to the removal of the disability of the President.[1]

On September 4 a sub-committee reported a plan for electing the President by electors and providing for an election of Vice-President by the same method. The President of the Senate was stricken out as successor to the President and the Vice-President was substituted. The phraseology as to the term of the successor was left unchanged. Thus it would seem probable that originally the Vice-President, in case at least of vacancy by removal, death, or resignation, was intended to discharge the duties of President only for a short period of time, until another President could be elected.

On September 7 the first reference in the convention to a vacancy in the office of both President and Vice-President was made. Mr. Randolph moved to add to the Committee report the following:

"The Legislature may declare by law what officer of the United States shall act as President in case of death, resignation, or inability of the President and Vice-President; and such officer shall act accordingly *until the time of electing a President shall arrive.*"

Mr. Madison objected that these latter words would prevent a supply of the vacancy by an intermediate election of the President;

[1] The report of the Committee of Detail provided that the President should hold office for seven years and should be elected by the national legislature.

and moved to substitute the words, "*until such disability be removed or a President shall be elected.*"

This motion was seconded by Mr. Gouverneur Morris and was adopted by the convention.

The Randolph motion was clearly inconsistent as to the length of term of the acting President with that of the term suggested for the Vice-President. The Madison motion brought the two terms into harmony, both being apparently intended to be temporary.

On September 12 the report of the Committee on Style changed the phraseology as to the Vice-Presidential term by striking out the same and by substituting the present language of the Constitution, — that the powers and duties of the office in case of removal, death, etc., "shall devolve on the Vice-President." This radical change in striking out the limitation of the term of the Vice-President certainly revealed an intention to have this term extend through the balance of the unexpired term; that the Vice-President serves out such unexpired term where a vacancy exists for other than disability, is, of course, not disputed. This same Committee also retained a clause to the effect that the acting President taking office because of a vacancy in the office of President and Vice-President, should hold office until "the period of choosing another President arrive."

Finally, on September 15, the draft of the Committee on Style was changed so that the term of the acting President was brought into harmony with the Madison motion of September 7.

The question as to the tenure of the acting President later arose in the Virginia convention called to ratify the Constitution. In answer to an objection by Mr. Mason that there was no provision in the Constitution for speedy election of another President, when the former is dead or removed, Mr. Madison replied:

> "When the President and Vice-President die the election of another President will immediately take place; and suppose it would not, all that Congress could do would be to make an appointment between the expiration of the four years and the last election, and to continue only to such expiration. This can rarely happen."

The above proceedings make it evident that the framers of the Constitution did not intend that the acting President should necessarily serve for the balance of the unexpired term; on the contrary, they so drafted the Constitution that, as regards at least the above clause, an intermediate election of President could

be held. We may perhaps even assume that a majority of the delegates were of the opinion that a special election should be ordered in such a contingency. How far such opinion, however clearly expressed, should control in the interpretation of the Constitution remains to be considered.

The Act of March 1, 1792. The 1st Congress considered legislation to carry out the above provisions of the Constitution, and a bill passed the Senate November 30, 1791. I cannot find the text of this bill, and the House debates do not throw much light upon it. The Senate debates were not then reported.

In the 2d Congress the Act of March 1, 1792, was enacted, the provisions of which, as to the officers designated temporarily and the special election, are explained above. When this bill was passed by the House, the Secretary of State was designated as the successor to the Presidency, and Madison, then a member of Congress, voted in favor of a motion to this effect. Had it not been for the jealousy of Jefferson entertained by the Federalists, there is little doubt but that the Secretary of State would have been designated in the law as finally enacted. The Senate, however, insisted that the President *pro tempore* of the Senate and the Speaker of the House should have the succession, and when the bill came back to the House that body yielded. On its final enactment Madison voted against the bill for this reason, among others.

Later, in a letter to Edmund Pendleton, Madison attacked the law vigorously, giving as his reasons that the President *pro tempore* of the Senate and Speaker of the House were not officers in a constitutional sense; that if the framers of the Constitution had contemplated these officers as successors they would have been specifically designated in the Constitution; that these officers, or either of them, becoming acting President, would continue to remain legislative officers; that their executive functions would be incompatible with their legislative functions; or that if the executive functions were to supersede the legislative, both must fail, as the former depend upon the latter.

The debates revealed a strong desire to postpone the whole question on the ground that there was radical difference of opinion and little chance that vacancies would occur in both offices in the near future. Some members favored giving the succession to the Chief Justice of the Supreme Court; others objected to the desig-

nation of any officer originally appointed by the President on the ground that the choice of a President might thus be taken from the people and given to the Chief Executive.

It should not be forgotten that certain members of this Congress had served in the Constitutional Convention and therefore were specially well qualified to interpret the Constitution. The Act of 1792, therefore, with its provision for a speedy special election of President, must stand as a legislative interpretation of that instrument entitled to great weight.

Proceedings in Congress Leading up to the Act of 1886. The question was further considered in Congress several times prior to the passage of the Act of 1886. In 1820 the Senate passed a resolution directing the Committee on the Judiciary to report whether any and what changes were necessary in the law of 1792; the Committee reported that it was not expedient to legislate further.

In 1856 the Committee on the Judiciary reported unanimously, under a resolution of the Senate directing the Committee to consider the constitutionality of the Act of 1792, and the necessity for further legislation, that the Act was constitutional, both as to the officers designated as successors, and the provision for a special election of President. The Committee recommended, however, that should there be a vacancy existing in the office of President *pro tempore* of the Senate and Speaker of the House, the Chief Justice of the United States (provided that this officer had not presided at the impeachment of the President) should succeed, and after him the Justices of the Supreme Court respectively in the order of the dates of their commissions. No further action was taken upon this resolution.

On December 6, 1881, a resolution was introduced in the Senate directing the Judiciary Committee to inquire as to the constitutionality of the law of 1792, and whether any new legislation was necessary. There was a full debate on the question of its passage. Decisions of the Courts were cited which seemed to show that the President *pro tempore* of the Senate and the Speaker of the House were not such officers of the United States as could succeed to the Presidency. Little was said, however, as to the authority of Congress to order a special election. It was not vehemently denied, and by many conceded, that as to that point the Act of 1792 was constitutional.

On December 8, 1881, Senator Garland introduced a bill designating the Cabinet officers as successors, and providing that they should hold office for the term provided in the Constitution and the laws, or if there was no occasion under the law for an election, until the term in which the vacancy arose should expire.

In 1882 Senator Hoar of Massachusetts introduced a bill designating the Cabinet officers in place of the President *pro tempore* of the Senate and the Speaker of the House, as successors, and fixing their term expressly for the balance of the unexpired Presidential term. The special election provided by the Act of 1792 was repealed by this bill. The Senator in debate gave many reasons as to the necessity for its passage. He called attention to the confusion and trouble which might arise from the fact that the term of a President must be for four years, and that thus a President elected at a special election might be inaugurated at other than the regular four-year period; that neither the President *pro tempore* of the Senate nor the Speaker of the House could possibly perform the duties of President in addition to their regular duties, while the duties of the Secretary of State could be performed by his assistants, thus giving him time to act as President. He further pointed out that the President *pro tempore* of the Senate holds office at the will of the Senate, and that thus his removal from office might cause a vacancy in the office of acting President. As to the general propriety of the Secretary of State becoming acting President, he stated that the office of Secretary of State is usually held by one of the leaders of his party; that six former Secretaries of State had been subsequently elected President, and that out of the ninety-six years during which this Government had been in operation, the office of President had been so held during thirty-six years.

Senator Hoar's bill was referred to the Judiciary Committee, which later reported a bill substantially in accordance therewith. On January 5, 1883, the matter was again taken up for debate. Radical difference of opinion was disclosed. Some members contended that the Act of 1792 was unconstitutional, both as to the officers designated and the special election. A preponderance of opinion seemed to be that the law of 1792 was unconstitutional in its designation of the President *pro tempore* of the Senate and Speaker of the House, but that Congress had constitutional power to order a special election. There was, however, diversity of opinion as to whether it would be expedient to exercise such power.

Had the bill become law as introduced by Senator Hoar, expressly fixing the term of the acting President for the balance of the unexpired term, no question could have arisen as to the constitutional power to order a special election. During the debates, however, a motion was made and adopted to strike out that part of the bill fixing the term as above and to substitute the exact language of the Constitution, thus giving to the Acting President a term "until the disability be removed or a President shall be elected." It was also moved to strike out that part of the bill repealing the special election clause of the Act of 1792. This motion was at that time defeated and the repeal was allowed to stand. Mr. Ingalls then offered and the Senate adopted an amendment (which subsequently became part of the law of 1886) as follows:

"That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting."

Senator Ingalls, in offering his amendment, said that it was contrary to the spirit of the Constitution for the Secretary of State to serve out the balance of the unexpired term and thus to remain in office perhaps for a large fraction of the original term. Senator Sherman, also favoring the amendment, said that "it might be necessary to pass a law in an emergency to expedite an election for President so as to change existing law."

Subsequently the amendment striking out the repeal of the special election clause was offered again and was adopted, and the bill passed the Senate with both of the above amendments incorporated therein, the special election clause of the Act of 1792 being thus left in full force. These amendments entirely changed the intent of the law as introduced by Senator Hoar.

In the 48th Congress a bill similar in form passed the Senate.

In the 49th Congress a bill introduced by Senator Hoar was reported by the Committee in the form as finally enacted into law, — the Act of January 19, 1886. This bill contained a clause specifically repealing the special election provided by the Act of 1792; the term of the acting President, however, was made the

same as in the bill passed by the Senate in 1883, viz.; "until the disability be removed or a President shall be elected."

The Act of 1886 was bitterly opposed in both Senate and House. Senator Edmunds said, evidently believing that the term of the acting President was fixed for the balance of the unexpired regular term:

"It approaches in its nature to the exertion of a royal prerogative of the King in his will or in some way naming the regent who shall perform the functions of the executive office in a kingdom, during the minority of the heir apparent."

In the House of Representatives, Mr. McKinley of Ohio (the late President) moved to strike out the bill and to substitute the law of 1792 with an additional proviso that whenever a vacancy existed in the office of President *pro tempore* of the Senate or Speaker of the House, the President should convene that house in which the vacancy existed for the purpose of electing a presiding officer. Referring to the mode of filling the vacancy, he said:

"I would leave that power with the people where it properly belongs. I am opposed to any step in the opposite direction."

The late Thomas B. Reed was also recorded against the bill.

Effect of the Act of 1886. Thus far we have confined ourselves to an examination of the Constitution and a history of the legislation and proceedings under it. We must now consider how the Act of 1886 has met the difficulties which it was feared might arise under the Act of 1792. Has it obviated, in the language of the House Committee reporting it, all possible danger of disturbance to the succession under the statutes, of contest disquieting to the nation, unsettling to business and disturbing to the peace of the country?

It must be admitted that the Act, so far as relates to the constitutionality of the designation of the President *pro tempore* of the Senate and the Speaker of the House, has, by substituting the Cabinet officers, met the difficulties successfully. As regards, however, the important question, — whether Congress has constitutional power to provide for an intermediate election of President, and whether the exercise of such power is expedient, — we shall find that the difficulties have not been removed, but that, on the contrary, the doubtful questions have been left in greater uncertainty than before.

Had the Act of 1886 been enacted into law in the form as originally introduced by Senator Hoar, it would, as above stated, have avoided all constitutional questions; for if Congress has constitutional power to order a special election, it has equal power not to order one, and the designation of the term of the acting President expressly for the remainder of the unexpired term would have settled the matter.

The two amendments referred to above, however, which, first adopted in the Act introduced in 1883, finally became part of the Act of 1886, will, I fear, at some future time intensify the very dangers the Act of 1886 was designed to meet. The first of these, it will be remembered, struck out the provision fixing the term of the acting President for the balance of the unexpired term, and substituted the language of the Constitution by which the acting President holds office "until the disability be removed or a President shall be elected." When we consider that Senator Hoar's bill was intended to interpret this very language of the Constitution, it would appear that the amendment nullified this purpose and left its meaning in as great uncertainty as ever. The other amendment was that of Senator Ingalls providing that the acting President must call Congress together in special session within twenty days. Although the Act of 1886 did specifically repeal the special election provided by the Act of 1792, yet the Ingalls amendment deprived this repeal of any significance, and left the question in suspense. There can be no possible doubt as to the motive in securing this latter amendment. It was made perfectly clear, both by Senator Ingalls and Senator Sherman, as shown above, that the object was to have Congress, when called together by the acting President, consider and determine whether or not to order a special election of President.

The Act of 1886, therefore, leaves the question of the constitutionality and expediency of a special election absolutely unsettled. The acting President, under the law, must call Congress together, and that body will then decide whether it deems a special election desirable and incidentally constitutional. If it decides in the affirmative, it will frame an act which may speedily oust the acting President from office. Such an act the acting President can veto, and if vetoed, the usual two-thirds vote will be necessary to overcome the veto. Even a death-blow might be administered by a pocket veto.

It is not disputed that consequences disturbing to business and

injurious to the prosperity of the country might follow under the Act of 1792. I fear, however, that under the Act of 1886 disturbance to business and injury to the prosperity of the country are to be feared almost as acutely, if of different kind. Let us suppose, for example, that a Republican President holds office but that the Republican party is in a minority both in the House and Senate. Such a condition existed under President Hayes in the 45th and 46th Congresses, and, the parties reversed, under President Cleveland in the 54th Congress. Let us further suppose that the Democratic majority wishes to reduce customs duties; that the Republican President dies; that there is no Vice-President; that the Secretary of State succeeds as acting President; that the Democrats in Congress, believing that the people desire radical reduction of taxation, yet know that the acting President will veto a tariff reduction bill; and that they are confident that a Democratic President can be elected on this issue. Can anyone doubt that under such circumstances a bill would speedily be introduced for a special election of President? Can anyone doubt the inadvisability of permitting an acting President to decide whether or not there shall be such a special election? If the acting President were to veto such a bill, it is to be feared that the majority in Congress might tie up the whole machinery of government.

Let us take another case. Suppose that a Republican President is in office, but that the Republican party is in a minority in one house and has a very slender majority in the other. This condition happened in 1881 under President Garfield. Let us further suppose that the President and Vice-President die; that the Secretary of State succeeds to the Presidency and that he is bitterly opposed by many members of his party. Is it going too far to predict that the Democratic party might introduce a bill for a special election, knowing its ability to pass it in one house and relying upon assistance from enough members of the Republican party to carry it through the other? Is it not conceivable that the acting President might use all the patronage he controls to prevent the passage of such a bill? Is it not also possible that Congressmen (of course none in the present Congress) might couple requests for appointments of constituents with a gentle intimation that, if made, the acting President need not worry as to the fate of any bill providing for a special election?

It is hardly possible to overestimate the disturbance to the business interests of the country which might arise under such

circumstances. The office of President would be held at the will of the legislative body. The power of the executive would be merged in that of Congress. Such a condition would be in hopeless conflict with the principles of the Constitution.

Proposed Remedies. What remedy suggests itself for these defects in the Act of 1886? Should provision be made for a special election of President; or should the term of the acting President be expressly fixed by law for the balance of the unexpired term?

A careful reading of the debates in Congress, in my opinion, must give rise to some doubts as to the constitutional power of Congress to provide for a special election of President. There is not a word in the Constitution expressly granting such power; the most that can be said is that the language of the Constitution is not necessarily inconsistent with it. The proceedings in the Constitutional convention reveal, to be sure, an intention not to preclude a special election. We may go farther and concede that they reveal a desire on the part of the members that a special election of President should take place. The desire of the framers, however, seems never to have been effectuated, unless indeed there is an implied grant of power in the Constitution. The constitutional provisions fixing the term of President for four years were cited in the debates as excluding any implied grant of such power on the ground that it could not have been the intention of the framers of the Constitution to break up the system of election of President at regular four-year intervals, and his taking office concurrently with that of the members of Congress. Whether, however, the power to provide for a special election, if such power exists, would or would not carry with it power to limit the term of the President thus elected to the balance of the unexpired term, I shall not discuss.

In this connection we should not, of course, overlook the weighty authority of Madison on the constitutionality of a special election. We must remember, however, that in the Constitutional Convention Madison, by his amendment, merely removed a positive obstacle to a special election, and that in the Virginia convention he gave expression to his opinion in debate on the question of adopting or rejecting the Constitution as a whole. Nor should we forget that Madison considered the Act of 1792 unconstitutional for other reasons, and that therefore it did not become necessary to consider carefully the constitutionality of that part

relating to the special election. Certainly he has left nothing in writing or speech to show that he ever very carefully considered or more than tacitly accepted the constitutionality of a special election.

The probable intent of the framers of the Constitution, not effectuated, does not go far in constitutional construction. For example, the Constitutional Convention struck out of that instrument the power to emit bills of credit, yet the courts found in other parts an implied power to emit such bills and to make them legal tender. So also the Convention struck out the power to grant charters of incorporation. Yet it is settled law that, under certain recognized limitations, Congress, under other clauses of the Constitution, has this power. Conversely, in the present case, the framers of the Constitution, in adopting the amendment of Mr. Madison, intended to remove and did remove a positive obstacle to a special election of President; the courts, however, must find a grant of power, express or implied, in other parts of that instrument to warrant such a special election, whatever may have been the intention of the framers.

Conceding, however, that there is good ground for difference of opinion, both as to the constitutionality and expediency of a special election, it will surely be agreed that the time for its discussion should not have been postponed, as it is by the Act of 1886, until the coming together of Congress in special session at the call of the acting President. Surely, also, there is no one who would not regret the possibility of Congress being influenced in its determination of such an important question by the opinion the members may entertain of the person at the time holding the office of acting President. Such a condition, if it ever arose, might make this government one of men rather than of laws.

I have not attempted here to pass judgment upon the merits of the debates as to the length of term of the acting President. For the purpose of this article I am willing to assume that public policy demands that the Secretary of State and the other Cabinet officers respectively should be the successors for the full unexpired term. I have tried to show, however, that the Act of 1886 has not accomplished this purpose and that it has other glaring defects.

What, then, is the remedy for such defects? The American people desire above all things to have certainty with regard to the succession to the Presidency. Two courses are open. The Act

of 1886 may be amended so that the acting President shall expressly hold office for the balance of the unexpired term or until the disability be removed. Or, in the alternative, the Constitution may be amended to provide that a special election of President shall speedily be held where the offices of President and Vice-President are both vacant through other causes than disability, and that the Secretary of State and other Cabinet officers respectively shall act as President only during disability or until the inauguration of the specially elected President. To remove all possible doubt, it should also be provided that the President so elected shall hold office only for the balance of the unexpired term. The vacancy in the Presidential office could then be filled with a minimum of disturbance to the business interests of the country. The new-comer would hold office for a fixed term and would be independent of Congress, as was intended by the Constitution, whether he were designated as acting President or elected specially as President. The difficulties and doubts first arising under the Act of 1792 and rendered little less obscure and disturbing by the Act of 1886, would disappear.

It may be true that the difficulties pointed out in this article are somewhat remote and not likely to arise in the near future. They are, however, just as likely to arise as is the double vacancy, on the possibility of which the Act of 1886 depends. A fair discussion of the questions involved, therefore, would seem to be not without some useful purpose.[1]

Charles S. Hamlin.

[1] Hon. Henry Cabot Lodge, United States Senator from Massachusetts, in an interesting and able article on the United States Senate, published in "Scribner's Magazine" for November, 1903, has pointed out that there is no provision in the Constitution covering the case of the death of the President-elect and the Vice-President-elect after the adjournment of the electoral college and before March 4th succeeding. This fact would seem to furnish another cogent reason for a re-examination of the whole question by Congress.